NO. 22371

MAY 10 1968

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE DOBBINS, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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I

JURISDICTIONAL STATEMENT

Appellant Lawrence Dobbins, Jr., was indicted May 24, 1967, for a violation of Title 18, United States Code, Section 1708 [C.T. 2]. [1/] A Judgment of Conviction on Count One of the indictment was entered on June 6, 1967 [C.T. 39]. Notice of Appeal was filed June 23, 1967 [C.T. 41].

Jurisdiction of the District Court was predicated on Title 18, United States Code, Section 3231. Jurisdiction of this Court is based upon Sections 1291 and 1294 of Title 28, United States Code.

1/ "C.T." refers to Clerk's Transcript.

II

STATEMENT OF THE CASE

Appellant was charged in Count One of the indictment with the theft from a post office of a letter addressed to the Hebrew Evangelization Society, Inc., P. O. Box 707, L. A. Calif. bearing the return address of D. Y. Horsley, 232 Milton, Colombia, Illinois 62236 [C. T. 2].

Counts Two and Three were dismissed by the trial court following the government's election to proceed on Count One only. The trial court previously had granted appellant's motion to require an election by the government [R. T. 158-9]. 2/

Defendant was arraigned on June 1, 1967; he entered a plea of not guilty [R. T. 7-8]. Trial by jury commenced on June 1, 1967, before the Honorable Charles H. Carr, United States District Judge [R. T. 9]. After the jury was unable to reach a verdict, a mistrial was declared [R. T. 241]. A second jury was impanelled and trial commenced June 7, 1967, before the Honorable Charles H. Carr [R. T. 252]. A verdict of guilty was returned on June 8, 1967 [R. T. 415]. Judgment of conviction was entered on June 19, 1967 [C T. 39]. Notice of Appeal was filed June 23, 1967 [R. T. 41].

2/ "R. T." refers to Reporter's Transcript.

III

STATUTE INVOLVED

Title 18, United States Code, Section 1708 provides:

"Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts to obtain, from out of any mail, post office, letter box, mail receptacle, . . . or other authorized depository for mail matter . . . any letter, . . . package, bag . . . Shall be fined not more than $2,000.00 or imprisoned not more than five years, or both."

IV

STATEMENT OF FACTS

Appellant Lawrence Dobbins, Jr., was a postal employee on March 22, 1967 [R. T. 270]. On that date, he appeared at the Terminal Annex, United States Post Office, but did not report for duty [R. T. 270]. At approximately 7:18 P. M. on March 22, 1967 [R. T. 311], prior to appellant's scheduled time for reporting to work [R. T. 276], appellant, contrary to instructions [R. T. 303-5], went to a mail sorting area of the post office [R. T. 311]. He rummaged through several trays of mail [R. T. 311] before extracting three letters [R. T. 312, 335-6] containing money [R. T. 366] which he then secreted in his pocket [R. T. 312-3, 335-7]. Shortly thereafter, appellant was confronted by a postal inspector and an investigative aid [R. T. 314, 336], at which time appellant forcibly

placed the letters into another tray of mail [R. T. 314-5, 336-7].

Defendant testified that he took the letters to embarrass the inspectors, but that he did not intend to steal them [R. T. 348].

V

QUESTIONS PRESENTED

1. Was it plain error to admit a diagram of the post office area into evidence?

2. Is the evidence sufficient to support the verdict?

VI

ARGUMENT

A. THE DIAGRAM WAS PROPERLY ADMITTED

A diagram of the area where the offense occurred was admitted into evidence without objection [R. T. 282]. An adequate foundation for the admission of the diagram was laid through the testimony of John Sloan, a general foreman with the United States post office [R. T. 281]. Counsel for the appellant had seen the diagram [R. T. 279] and expressly stated that he had no objection to its admission [R T. 282].

Illustrative diagrams or charts are admissible when properly identified.

United States v. Rosenberg, 195 F. 2d 583 (2d Cir. 1952), cert. denied, 344 U. S. 838 (1952);

United States v. Mortimer, 118 F. 2d 266 (2d Cir. 1941), cert. denied, 314 U. S. 616 (1941).

Any error in the admission of the chart would be harmless under the circumstances of this case in any event.

See Elder v. United States, 213 F 2d 876 (5th Cir. 1954), cert. denied, 348 U. S. 901 (1954).

B. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

The jury could infer that appellant intended to steal from the following facts:

(1) Appellant, against his instructions, was in a work area before he punched in for work [R. T. 276, 303-5, 311].

(2) Appellant, against his instructions, took letters and secreted them in his pocket [R. T. 303-5, 312-3, 335-6].

(3) Upon being confronted by the postal authorities, appellant attempted to dispose of the letters [R. T. 314-5, 336-7].

When considering the sufficiency of the evidence, an appellate court must view the evidence taken at trial in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom. Noto v. United States, 367 U.S. 290 (1961); Glasser v. United States, 315 U.S. 60 (1942).

If the court then finds substantial evidence, it must presume

the findings of the trier of fact to be correct, and the judgment must be sustained. Noto v. United States, supra; Ingram v. United States, 360 U.S. 672, 678 (1959).

The credibility of witnesses and the weight to be given their testimony is a matter within the province of the trier of fact. Stoppelli v. United States, 183 F. 2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950).

The record before this Court discloses more than substantial evidence to support the verdict.

VII

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen

CRAIG B. JORGENSEN